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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 748

PAUL R. CASAVINA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

PAUL R. CASAVINA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Paul R. Casavina, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 7, 1966.

Opinion Below

The opinion of the court below (*infra* Appendix A, pp. 1a to 2a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 7, 1966. The jurisdiction of this Court is invoked.

Statement of Questions Involved

1. Whether the court committed plain error in its instructions to the jury when it charged that it was not necessary that all of the allegations of the indictment be proven so long as some of the material allegations were proven.

2. Whether the court abused its discretion by unduly limiting cross examination of an accomplice witness.

Constitutional Provision Involved

The Fifth Amendment of the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

The Grand Jury for the District of New Jersey returned an Indictment on October 30, 1963 in eleven Counts charging the Petitioner, Paul R. Casavina along with Horace J. Parisi, Averom Black (deceased), Frank R. Petrucci (acquitted) and Casavan Industries, a corporation (severed and dismissed) with violations of the United States

Code having to do with the fraudulent sale of securities and the employment of the U. S. mails in connection with a scheme to defraud.

The trial was moved on March 9, 1965 before the Honorable Thomas F. Meaney and a jury. The death of the defendant, Ayerom Black, was noted on the record and the charges against him were severed. An application was granted for severance as to the defendant, Casavan Industries, and Count XI of the Indictment was ordered severed by the Court.

At the end of the case on behalf of the Government, the defendants moved for Judgment of Acquittal, which Motions were denied. Said Motions were renewed at the end of the entire case and again denied. On April 8, 1965 the jury returned a verdict of guilty against Paul R. Casavina on each of Counts I through X of the indictment. As to Horace J. Parisi, the verdict was not guilty on Counts I, III, IV, VI, VII, IX and X and guilty on Counts II, V, VIII. The verdict as to Frank R. Petrucci was not guilty on all Counts.

Both Casavina and Parisi subsequently moved for Judgment of Acquittal, or in the alternative, for a new trial, which Motions were denied. The petitioner Casavina was sentenced to five years imprisonment on each of the Counts I, II, III, IV, and V to run concurrently, and three years on each of Counts VI, VII, VIII, IX, and X to run concurrently with each other but consecutive to the sentences imposed under Counts I, II, III, IV and V.

Casavina appealed to the United States Court of Appeals for the Third Circuit from the judgment below. The Court of Appeals affirmed the judgment of the district court.

Reasons for Granting Writ

The question presented by this case represents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In essence it involves the standards of fairness acknowledged as the responsibility of all parties to a federal criminal proceeding.

A. The court gave contradictory instructions to the jury concerning the burden of proof to be borne by the prosecution.

The Court in its instructions to the jury was most careful to explain in a succinct and understandable manner the elements of the offense charged. However, when it came time to cover the burden of proof which is the responsibility of the prosecution, the Court committed error which could have had only one result. It must have left the jury in a quandry as the responsibility of the prosecution for in the middle of the charge, the Court said,

> "It therefore is not necessary that all of the allegations of the indictment be proven so long as *some* of the material allegations are proven. They must be proven though beyond a reasonable doubt." (2351a) (emphasis supplied).

It is agreed that the Court prior to the utterance recited above, stated:

> "I shall state now, and repeat hereafter, that it is necessary for the government to prove each of these elements beyond a reasonable doubt. This is true of all of the allegations made throughout the course of the trial by the government." (2346a).

Again, prior to the erroneous charge, the Court stated:

> "Here again, let me repeat, it is necessary that every element of this charge be proven by the government to your satisfaction beyond a reasonable doubt." (2350a).

And further, that the error passed unnoticed and was not called to the Court's attention after the Court had completed its instructions and prior to the jury having retired to its deliberations (2357a-2358a).

It also appears from the careful reading of the charge of the Court that at the time that the erroneous statement was made the Court was referring to alleged misrepresentations charged in the Indictment and the Court was attempting to explain to the jury that it was not necessary for the government to prove all of the misrepresentations, but it was only necessary that there be proof of sufficient misrepresentation to convince the jury beyond a reasonable doubt that a scheme to defraud was employed by the defendants. Unfortunately, by its choice of language the Court thereafter undertook in broad terms to clarify its position to the jurors but the words chosen were much too broad and left the jury with the clear impression that the government need not prove all of the material allegations of the Indictment.

As was said by Judge Goodrich speaking for the Third Circuit Court of Appeals in the case *United States* v. *Martell*, 199 F. 2d 670, 672 (3d Cir. 1952):

> "No one can know for certain what a given portion of a charge does to the collective minds of the jury. . . ."

See also *United States* v. *Link*, 202 F. 2d 592, 594 (3d Cir. 1953).

We are mindful of the provisions of *Rule 30* of the *Federal Rules of Criminal Procedure* and understand that it has been generally held that in the absence of plain error, failure to object to the Court's instructions forecloses the Appellant's rights to object to such instructions on appeal. *Lopez* v. *United States,* 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963); *Phillips* v. *United States,* 334 F. 2d 589 (9th Cir. 1964); *United States* v. *Malfi,* 264 F. 2d 147 (3d Cir. 1959) *cert. den.* 361 U. S. 817, 80 S. Ct. 56, 4 L. Ed. 2d 63.

The court in order to correct a manifest injustice may notice plain errors or defects even though they were not brought to the attention of the court. *Rule 52 (b) Federal Rules of Criminal Procedure; United States* v. *Cumberland,* 200 F. 2d 609 (3rd Cir. 1952).

In the case at bar there can be little question but that the contradictory instructions of the Court on one of the most fundamental principles enunciated in the instructions to the jury constitutes plain error and requires reversal. The United States Supreme Court in the case of *Bollenbach* v. *United States,* 325 U. S. 607, 613, 66 S. Ct. 402, 90 L. Ed. 350 (1946), states:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

It seems logical to hold to the principle that where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it constitutes reversible error since it is impossible to tell which charge the jury followed. *Nicola* v. *United States,* 72 F. 2d 780, 787 (3d Cir. 1934); *United States* v. *Donnelly,* 179 F. 2d 227, 233 (7th Cir. 1950).

B. The court abused its discretion by unduly limiting the scope of cross examination of an accomplice.

It is no longer open to doubt that a jury may convict on the testimony of an accomplice alone. *U. S.* v. *Marpes,* 198 F. 2d 186, 188 (3d Cir. 1952), cert den. 344 U. S. 876; *U. S.* v. *Fawcett,* 115 F. 2d 764, 768 (3d Cir. 1940). However, in view of the nature of testimony that might be expected from an accomplice, the defense is always permitted by cross-examination to show, if possible, that the testimony of such a prosecution witness was given in return for the promise of a lighter sentence or other preferential treatment. *U. S.* v. *Hogan,* 232 F. 2d 905 (3d Cir. 1956). The right of the defendant in this respect is considered so valuable that a denial of it constitutes reversible error and an abuse of the Trial Court's discretion in the limitation of cross-examination. *U. S.* v. *Migliorino,* 238 F. 2d 7, 11 (3d Cir. 1956). See also *Gordon* v. *U. S.,* 344 U. S. 414 (1953) and *U. S.* v. *Aviles,* 274 F. 2d 179, 191 (2nd Cir. 1960).

In this case the first witness called by the Government was Frank A. Cerruti, who was not named as a defendant in the Indictment though he was named as a co-conspirator, not indicted in Count XI of the Indictment which Count was severed by order of the Court and subsequently dismissed. The defendants, on several occasions during the course of their cross-examination, attempted to go into the area concerning the interest Cerruti had in his testimony and in each instance they were blocked by action of the Court in sustaining objections made by the Prosecutor. The fact that Cerruti had an intimate knowledge of the workings of Casavan Industries and was well acquainted with the personal affairs of the individual defendants and yet was not the subject of prosecution, was an important factor for consideration by the jury. The fact that the de-

fendants were hampered in their efforts to bring such facts to the attention of the jury was an abuse of discretion which comes within the scope of the rule of the *Hogan* case, 232 F. 2d 905 (3d Cir. 1956).

The Defendants were permitted to question the witness in the following manner:

> "Q. Mr. Cerruti, before you took the stand today, and any time prior thereto, did you have an agreement or understanding with the representatives of the Federal Government that in consideration of your testifying in behalf of the Government you would not be indicted as a defendant or prosecuted in this matter? A. Quite to the contrary, sir.
>
> Q. You didn't have that agreement? A. Absolutely not.
>
> Q. Did you read the indictment— A. No, sir.
>
> Q. You never did? A. No, sir.
>
> Q. I didn't finish my question. I wanted to ask you did you ever read the indictment that is presently here before the Court and jury? A. No, sir.
>
> Q. You never read Count 11? A. I have read no part of it.
>
> Mr. Lofton: If your Honor please—
>
> The Court: We are not concerned with a jury question. It was separated.
>
> Mr. Santorf: That's right, sir. That doesn't bar me from asking him.
>
> Mr. Lofton: If your Honor please, I don't see why not, if that is not one of the matters before the Court. I don't see how Mr. Santorf can inquire about something that he requested be severed.
>
> Mr. Santorf: In order to show interest I certainly am entitled to show that he—

The Court: You ask him the question as to whether or not any promises had been made to him, or any representation made that he would not be indicted and he answered definitely no.

Mr. Santorf: And I want to show the actual fact.

The Court: It is not mentioned.

Mr. Santorf: Pardon?

The Court: It is not mentioned.

Mr. Santorf: Oh, yes, he is.

The Court: As a conspirator?

Mr. Santorf: Yes, sir.

The Court: Is he indicted as a conspirator?

Mr. Santorf: That is just the point. He is not indicted.

The Court: All right. That is on the record then. But it is his testimony that he was not made any promise of such situation.

Mr. Santorf: That's right. Now I am entitled to show the fact.

The Court: The fact had been indicated.

Mr. Santorf: Pardon?

The Court: The facts have been indicated.

Mr. Santorf: By whom, sir?

The Court: By me.

Mr. Santorf: Well, the fact that it is indicated by your Honor, I mean—

The Court: What are you going to try and show?

Mr. Santorf: I want to show, if your Honor please, that in this indictment he—this witness—is charged in the ten counts, by repetition, as aiding or conspiring and agreeing with the remaining defendants to commit all these frauds, and that he

was never named a defendant, and has never been prosecuted, notwithstanding the charge that he is a co-conspirator. I am entitled to bring that out to show bias, to show interest for his testimony here, under the rules of evidence.

Mr. Lofton: If your Honor please, Mr. Santorf first of all says that Mr. Cerruti is charged with having been a co-conspirator. As Mr. Santorf well knows, it is not a criminal violation to be a co-conspirator, only to be a co-conspirator defendant. And, therefore, the mere fact that Mr. Cerruti is named as a co-conspirator would not ipso facto make it necessary for him—

The Court: He was named as a co-conspirator and not indicted. And that is the situation.

Mr. Santorf: He is named as co-conspirator—

The Court: And not indicted.

Mr. Santorf: As a defendant; yes, sir.

The Court: As a defendant.

Mr. Santorf: It recites the ten counts and charges this man as a co-conspirator. If that is stipulated on the record, I will stop and cease there.

Mr. Lofton: I don't like the word Mr. Santorf uses—charges Mr. Cerruti as—

The Court: He is mentioned as a co-conspirator.

Mr. Santorf: Yes, sir; it is right in there.

The Court: And not indicted.

Mr. Santorf: Right, sir.

Mr. Lofton: He is not charged with anything.

Mr. Santorf: Now I object to that. This is not what is in the record.

The Court: He is mentioned as a co-conspirator but not indicted.

Mr. Santorf: That is right, sir.

The Court: All right.

Mr. Santorf: With that stipulation then we won't pursue it.

Q. Up to the present time, notwithstanding the fact that you have been named in this indictment as having conspired, or having these defendants conspire together with you to commit these frauds, notwithstanding that, have you to the present time ever been prosecuted for any one of these charges set forth in the indictment pending here in court?

Mr. Lofton: If your Honor please, I object to that question. The witness has already answered that question.

The Court: The question has been answered.

Mr. Santorf: It has been answered?

The Court: It has been answered.

Mr. Santorf: I didn't hear it, your Honor.

The Court: He said that he was not indicted. And he also said—he couldn't be tried unless he was indicted.

Mr. Santorf: Yes, he could, your Honor.

The Court: Unless he waives indictment.

Mr. Santorf: No, there could be an allegation—the Government could draw a charge against him without an indictment, and all he has to do is waive indictment.

The Court: Have you ever waived indictment?

The Witness: No, sir.

Q. Have you ever been prosecuted up to the present time for any of the charges contained in this entire indictment?'' (App. 271a-276a).

The court permitted the basic fact that Cerruti was never indicted though mentioned as a co-conspirator to be presented to the jury but the court left no doubt that it would tolerate no attempt to pursue the line of questioning any further, when it made the following statement to the jury.

> "The Court: Ladies and gentlemen of the jury, this defendant has said that he has not been promised by any official of the S. E. C. or the Government that he would not be tried or that he would not be indicted. He is mentioned as a conspirator with others, but not indicted as such.
>
> Now, that is as far as you can go." (App. 276a)

It was the theory of the defendants as demonstrated by the record that Cerruti was biased as a witness and was doing his utmost to insure a successful prosecution. A careful reading of his testimony will reveal that he was inclined to be argumentative and evasive while under cross-examination. He was also inclined to volunteer information, which was not responsive, where he apparently thought that such volunteered answers would be injurious to the cause of the defendants. The defendants were certainly entitled to explore every avenue in an effort to present to the jury all of the facts upon which the jury could make a determination as to whether or not there was in fact collusion between the government or some agent of the government and Mr. Cerruti. The fact that the record of the trial leaves no question but that Mr. Cerruti was clearly as culpable as the co-defendants who were indicted must open the door to a broad inquiry into his motives for testifying as he did. Cerruti's testimony made the documentary evidence of the prosecution come to life. His testimony assisted the jury in drawing from the mountains of circumstantial evidence before it, inferences which would be un-

favorable to the defendants. His motives should have been fair game for the broadest type of cross-examination, instead the court at the urging of the United States Attorney saw fit to place a severe limitation upon what has been characterized as "greatest legal engine ever invented for the discovery of the truth." *Wigmore on Evidence,* Third Edition, Vol. V, sec. 1367.

CONCLUSION

The Petitioner was deprived of his liberty without due process of law in violation of the Constitution of the United States. The Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX A

Opinion of the Court

(Filed—October 7, 1966)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15607

UNITED STATES OF AMERICA

v.

PAUL R. CASAVINA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued September 13, 1966

Before STALEY, *Chief Judge*, and McLAUGHLIN and KALODNER, *Circuit Judges*.

PER CURIAM.

Appellant was indicted for and tried and convicted of the fraudulent sale of securities and the use of the mails in connection with a fraudulent scheme. He raises numer-

ous issues which, for the most part, appear to be mere afterthoughts.

Having failed to object to certain portions of the court's charge, he now maintains, as he must, see F. R. Crim. P. 30, 52(b); Lopez v. United States, 373 U. S. 427, 436 (1963), that clear error was committed in each of these instances or when all of these matters are considered together. Specifically, the appellant attacks the court's charge on burden of proof, the manner in which the jury should consider and the weight to be given the testimony of co-conspirators and experts, and lastly, the failure of the court to define "accomplice" to the jury. Read in its entirety, no clear error appears in the charge. The fact that the court could easily have amplified the charge by including some clarifying language, the absence of which appellant *now* complains, is a far cry from clear error. Nor does the aggregation of these points give rise to clear error.

Appellant also maintains that the district court unduly limited the cross examination of an accomplice. He recognizes that at this stage such a contention must be addressed to an abuse of the trial court's discretion. Our review of the record fails to disclose any such abuse. To the contrary, the record illustrates the wide latitude enjoyed by counsel in the extensive cross examination and re-cross examination of the witness involved.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Judgment Filed October 7, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,607

UNITED STATES OF AMERICA

vs.

PAUL R. CASAVINA and HORACE J. PARISI
PAUL R. CASAVINA,

Appellant.

(D. C. CRIMINAL No. 401-63)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ——— DISTRICT OF NEW JERSEY

Present: STALEY, *Chief Judge*, and McLAUGHLIN and KALODNER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 22, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

October 7, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 748

PAUL R. CASAVINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for New Jersey of mail fraud and securities violations in the sale of stock. On June 15, 1965, he was sentenced to imprisonment for a period totalling eight years. The conviction was affirmed on appeal, *per curiam* (Pet. App. A). The petition raises no issues warranting review by this Court.

1. In its charge, the court instructed that "* * * the burden of proving the guilt of the accused beyond

a reasonable doubt is upon the Government and that burden never shifts" (R. 2341a). After explaining the elements of the offenses charged, the court twice said that it was necessary that each element be proved by the government beyond a reasonable doubt (R. 2346a, 2349a-2350a).

Subsequently the court stated (R. 2351a):

> A number of alleged misrepresentations have been charged in the indictment but it is not necessary that all of them be proved. It is necessary only that there be sufficient misrepresentation or omission of material facts or other fraudulent activities to convince you beyond a reasonable doubt that a scheme to defraud was employed or a course of business that would defraud was knowingly engaged in by the defendants in the offer and sale of securities. It therefore is not necessary that all of the allegations of the indictment be proven so long as some of the material allegations are proven. They must be proven though beyond a reasonable doubt.

Petitioner's contention that this latter statement resulted in confusion as to the burden of proof is without merit. The court merely pointed out, correctly, that the government was not required to prove all of the misrepresentations alleged in the indictment. See *Myrick* v. *United States*, 332 F. 2d 279, 280 (C.A. 5), certiorari denied *sub nom. Bergman* v. *United States*, 377 U.S. 952. The court was in no way deviating from its previous instructions that the government had the burden of proving beyond a reasonable doubt all of the elements of the particular

statutory crimes charged. That petitioner's contention is a mere afterthought is shown by his failure at the time of the charge to make the objection now urged (R. 2357a-2358a). Rule 30, Fed. R. Crim. P.; *Lopez* v. *United States*, 373 U.S. 427, 436.

2. There was no improper limitation on cross-examination of a government witness. Cerruti, petitioner's accountant, testified as a government witness on direct examination as to various stockholders' meetings, transfers of corporate shares and property, registration certificates, and misrepresentations in effecting the fraudulent scheme (R. 33a-248a). On cross-examination by petitioner's counsel it was brought out that Cerruti had given a statement to the Securities and Exchange Commission and that he had previously been convicted of forgery, embezzlement, and grand larceny (R. 251a, 254a-257a). Later in the cross-examination the following colloquy occurred (R. 271a):

> Q. Mr. Cerruti, before you took the stand today, and any time prior thereto, did you have an agreement or understanding with the representatives of the Federal Government that in consideration of your testifying in behalf of the Government you would not be indicted as a defendant or prosecuted in this matter?
> A. Quite to the contrary, sir.
> Q. You didn't have that agreement?
> A. Absolutely not.

Petitioner's counsel then said that he wanted to show that "in this indictment he—this witness—is charged in the ten counts, by repetition, as aiding or

conspiring and agreeing with the remaining defendants to commit all these frauds, and that he was never named a defendant, and has never been prosecuted, notwithstanding the charge that he is a co-conspirator. I am entitled to bring that out to show bias, to show interest for his testimony here, under the rules of evidence" (R. 273a). In the colloquy that ensued (Pet. 10-11), the point which counsel sought to establish was clearly brought out. As the Court stated at the conclusion of the discussion (R. 276a):

> Ladies and gentlemen of the jury, this defendant has said that he has not been promised by any official of the S.E.C. or the Government that he would not be tried or that he would not be indicted. He is mentioned as a conspirator with others, but not indicted as such.
>
> Now, that is as far as you can go.

There was no abuse of discretion in this matter.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

DECEMBER 1966.

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